128-141

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 781

WILLIAM G. ASHER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

FILED OCTOBER 10, 1887.

when the roadbed was completed; from which it is infered, (although it is not exactly clear from the statement of the counsel what is meant) that the consolidation was effected on the 20th of September, 1870, and the bonds were to be issued when the roadbed was completed. (Brief of plaintiff in error p. 7) The supposed ground of assault seems to be that the bonds were issued and delivered before the completion of the road, but the petition of the taxpayers states, and the condition upon which the subscription was made, asserts (see record p. 77) that "the bonds to be issued to said Company when it shall have continuously graded its roadbed on or near its present located survey from the city of Chillicothe to the western boundary of Livingston County," and not upon the completion of the road as is erroneously assumed.

For the foregoing reasons it is submitted that the judgment of the Court below should be affirmed.

G. S. ELDREDGE,

Counsel for Deft. in Error.

128-129

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1449~~ 781

WILLIAM G. ASHER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

FILED OCTOBER 10, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1149.

WILLIAM G. ASHER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of *habeas corpus*	2	1
Writ of commitment	4	2
Request of Judge of Harris Co.	5	3
Writ of *habeas corpus*	8	4
Return to writ	8	4
Agreed statement of facts	10	4
Opinion	12	6
Judgment	28	14
Petition for writ of error	29	15
Order granting writ of error	32	17
Bond	33	17
Clerk's certificate	35	18
Writ of error	37	18
Citation and proof of service of same	40	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 16, 1887.

1 *Caption.*

THE STATE OF TEXAS, *County of Travis:*

At a term of the hon. court of appeals of the State of Texas, begun and holden at Austin within, the said State of Texas, in the court-room of said court, on the 4th day of April, A. D. 1887, and ending on the 25th day of June, A. D. 1887—present, the Hon. John P. White, presiding judge; Hon. Sam. A. Willson and J. M. Hurt, judges; also Hon. W. L. Davidson, assistant attorney general for the State of Texas, and James L. White, clerk of said court—a full bench being present, the following cause came on for trial, to wit:

Ex parte WILLIAM G. ASHER. No. 5565.

From Harris county, Texas.

2 THE STATE OF TEXAS:

Before the Honorable Court of Appeals, to the Austin Term, A. D. 1887.

Ex parte WM. G. ASHER.

To the honorable the judges of the court of appeals of the State of Texas, at Austin:

The humble petition of Wm. G. Asher respectfully represents unto your honorable court that petitioner is a *bona fide* resident citizen of the State of Louisiana, and as such citizen of said State did on the 27th day of May, A. D. 1887, and about one month prior thereto, pursue in the State of Texas a calling and business lawful under the Constitution and laws of the United States, to wit, the occupation of drummer or solicitor of trade by sample or otherwise for goods and wares manufactured in the said State of Louisiana; that on or about the 27th day of May, A. D. 1887, petitioner was arrested by one Geo. Ellis, who, he is informed, believes, and charges, is the sheriff of Harris county, in the State of Texas, and that on the 28th day of May, A. D. 1887, petitioner was tried before one Jas. A. Breeding, a justice of the peace of precinct No. 1, in and for said county of Harris, State of Texas, upon the charge of pursuing the occupation of commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, without a license, then and there found guilty and fined in the sum of thirty-five dollars and costs; and for failure to pay said fine and costs your petitioner was remanded to the custody of the aforesaid sheriff under a writ of commitment issued by said justice of the peace, a copy whereof is hereunto attached and made a part of this petition; and petitioner is now by said sheriff restrained in his liberty by virtue thereof. Your humble petitioner alleges that the statute law of the State of Texas, under which your petitioner is restrained in his liberty, is uncon-

3 stitutional and void in this: That it contravenes the Constitution of the United States and is in violation of and repug-

nant to the interstate commerce clause of the Constitution of the United States and the laws of Congress passed thereunder; that the said State law under which your petitioner is held, to wit, article 4665, chapter 17, of the General Laws of the State of Texas, passed at the special session of 1882, imposing a license tax upon drummers and others selling by sample, is a regulation of interstate commerce, and, therefore, unconstitutional as applied to the citizens of other States.

Wherefore your petitioner humbly prays this honorable court to grant him the most gracious writ of *habeas corpus* that the matters and things herein alleged be inquired into, and, upon hearing, that your petitioner be awarded his liberty.

Your petitioner humbly presents this his application for the writ of *habeas corpus* to the honorable court of appeals of the State of Texas for this: That he is illegally restrained in his personal liberty, and is advised and avers that adequate and immediate relief to your humble petitioner would not be afforded him by suing out writ of *habeas corpus* before a county or district judge in this State, as your petitioner believes and avers that he judiciary of the inferior tribunals of the State of Texas would prefer that the matters herein set out and the law herein at issue be passed upon by the honorable court of appeals, and your petitioner avers that, in event the inferior courts refused to award petitioner his liberty under the writ of *habeas corpus*, his remedy would be by appeal to your honorable court, which petitioner believes would involve and consume valuable time to your petitioner under illegal duress and greater expense to the State of Texas than by directly applying to this honorable court for said writ. Wherefore your petitioner humbly prays as before.

WM. G. ASHER.

STATE OF TEXAS, *County of Harris:*

Before the undersigned authority this day personally appeared Wm. G. Asher, who, after being by me first duly sworn, deposes and on oath says that the allegations of the foregoing petition are true according to the belief of the petitioner.

M. KIRLICKS,
Notary Public, Harris Co., Texas.

Endorsed: *Ex parte* Wm. G. Asher. Petition for the writ of *habeas corpus.*

THE STATE OF TEXAS, *County of Harris:*

In Justice Court, 1 Precinct, Harris Co., to the Special Term, 1887.

To the sheriff or any constable of Harris county, Greeting:

Whereas on the 28th day of May, A. D. 1887, Wm. G. Asher, charged with the offense of pursuing occupation without license, was convicted thereof, and the penalty assessed at $35.00 *dollars* fine, together with the further sum of $20.45 *dollars* costs in that behalf

expended, you are therefore commanded to take the body of said Wm. G. Asher and him safely keep until said fine and costs be paid.

Herein fail not, but of this writ make due return, as the law directs, showing how you have executed the same.

Given under my hand this 28th day of May, 1887.

JAMES A. BREEDING,
Justice of the Peace of Precinct No. 1, *Harris County.*

State fine	$35 00
Gillaspie	10 00
Justice	4 95
Sheriff Ellis	6 50
	$56 45

Endorsed on reverse side: No. —. In Harris county justice court, 1 precinct. Commitment. The State of Texas *vs.* Wm. G. Asher. Copy.

State fine	$35 00
Lubbock	10 00
Justice	4 95
Sheriff Ellis	6 50
	$56 45

To the honorable the court of appeals of the State of Texas:

The undersigned, the county judge of Harris county, Texas, having been advised that one Wm. G. Asher has petitioned your honorable court for a writ of *habeas corpus* to inquire into the cause of his detention in the county jail of said county and his alleged illegal restraint by virtue of a trial and conviction for a misdemeanor offense, and, having been further advised that the object of the said inquiry is to determine the constitutionality of the law under which said conviction was had, respectfully joins in the request to the honorable the court of appeals that the said writ be granted; that the matters set out in said Asher's petition and the law therein cited at issue be passed upon by the honorable court of appeals of the State of Texas.

Houston, June 9th, 1887.

Respectfully submitted,

W. C. ANDERS,
County Judge, Harris County.

STATE OF TEXAS, *County of Harris:*

Before the undersigned authority this day personally appeared John A. Kirlicks, who, after being by me first duly sworn, deposes and on oath says that Gustave Cook, judge of the criminal district court of Harris and Galveston counties, is at the present time not within his judicial district.

JOHN A. KIRLICKS.

Sworn to and subscribed before me this 9th day of June, A. D. 1887.

W. C. ANDERS,
County Judge, Harris County.

7 Endorsed: *Ex parte* Wm. G. Asher. 5565–5. Petition for writ of *habeas corpus.* Filed, court of appeals, June 9, 1887. James L. White, clerk, by John Oxenford, deputy.

8 The State of Texas to the sheriff of the county of Harris, Greeting:

Whereas it has been made to appear to the court of appeals of the State of Texas, by original application for the writ of *habeas corpus* addressed to the said court, that William G. Asher is illegally restrained of his liberty and is held in custody by George Ellis, the sheriff of Harris county, Texas, these presents are to command you to produce before the said court of appeals, at Austin, Texas, at 2 o'clock p. m., on Saturday, June 11, 1887, the body of said Wm. G. Asher, when and — you will show cause why you hold the said William G. Asher in custody.

Herein fail not and make due return of this writ.

Witness the Hon. John P. White, presiding judge of the court of appeals of Texas. Done at Austin this tenth day of June, 1887.

JOHN P. WHITE,
Presiding Judge.

The service of the above and foregoing writ of *habeas corpus* upon the sheriff of Harris county is waived, and return is hereby made upon said writ that said Wm. G. Asher is held by said Geo. Ellis, sheriff of Harris county, Texas, by virtue of a writ of commitment issued by Jas. A. Breeding, justice of the peace in and for Harris county, Texas, for fine and costs adjudged against said Asher for pursuing occupation without license.

GEO. ELLIS,
Sheriff of Harris Co., Texas,
By M. C. McLEMORE, *Counsel.*

9 Endorsed: *Ex parte* Wm. G. Asher. 5565–5. Writ of *habeas corpus.* Filed, court of appeals, June 10th, 1887, Austin, Texas. James L. White, clerk, by John Oxenford, deputy.

10 Before the Hon. Court of Appeals of the State of Texas, on *Habeas Corpus* Trial.

Ex parte WM. G. ASHER.

The following statement of facts in this case are agreed upon by and between the State and defendant:

1st. Section 3, chapter 17, of the General Laws of the State of Texas, passed at the call session of the 17th Legislature, amending article 4665, chapter 1, title 95, of the Revised Statutes, as amended March

24, 1881, approved May 4th, A. D. 1882, provides that there shall be levied on and collected from every commercial traveller, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of thirty-five dollars, payable in advance, and payable to the comptroller of public accounts, and making a misdemeanor offense finable in a sum not less than twenty-five nor more than one hundred dollars, upon the demand of the tax collector of any county of the State or any peace officer of said county, the failure to exhibit to such officer the comptroller's receipt above mentioned.

2d. Article 110, chapter 5, title 4, of the Penal Code of the State of Texas, provides that " any person who shall pursue or follow any occupation, calling, or profession, or do any act taxed by law without first obtaining a license therefor shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum.

3d. Wm. G. Asher is a resident and citizen of the city of New Orleans, State of Louisiana, and on the 27th day of May, A. D. 1887, and for about the period of one month prior thereto, was engaged in the business of soliciting trade by the use of samples for the house for which he worked as drummer, in the city of Houston,
11 Harris county, State of Texas, said house being Chas. G. Schulze, of New Orleans, Louisiana, who was a manufacturer of rubber stamps and stencils, for the sale of which said Asher was then and there soliciting orders or trade. While engaged in the act of drumming for said Charles G. Schulze, and for the claimed offense of not having taken out the required license for so doing said business, the defendant, Wm. G. Asher, was arrested by one Geo. Ellis, sheriff of said county of Harris, State of Texas, and carried before the Hon. James A. Breeding, a justice of the peace of precinct No. 1 of said county of Harris, State of Texas, and fined for the offense of pursuing the occupation of drummer without a license. It is admitted that Chas. G. Schulze is engaged in manufacturing in New Orleans, State of Louisiana, and in selling rubber stamps and stencils, and that it was a line of such articles for the sale of which the said defendant, Wm. G. Asher, was drumming at the time of his arrest; that the relator, Asher, was soliciting said orders and was making said sales for his said non-resident employers in the county of Harris and in the State of Texas.

We hereby agree that the above and foregoing is a true and correct statement of the facts of this case.

JOHN A. KIRLICKS,
Counsel for Asher.
W. L. DAVIDSON,
Ass't Att'y Gen'l for the State.

Endorsed: *Ex parte* Wm. G. Asher. Agreed statement of facts. Filed, court of appeals, Jun. 10, 1887, Austin, Texas. James L. White, clerk, by John Oxenford, deputy.

12 *Opinion by Presiding Judge, John P. White.*

In Court of Appeals of Texas.

Ex parte Wm. G. Asher. 5565. 5th Assignment.

Habeas corpus from Harris county.

This is an original application to this court for the writ of *habeas corpus*, in which it is alleged that the applicant is illegally restrained of his liberty for failure and refusal to pay a fine of thirty-five dollars—$35.00—imposed upon him by a justice of the peace of Harris county on the charge of pursuing the occupation of a commercial traveller, drummer, or solicitor of trade by sample, without having paid the occupation tax prescribed by law on said occupation.

It is admitted that applicant is a citizen of Louisiana and that he did pursue such occupation in Harris county, State of Texas, without having paid said occupation tax. It is admitted that the law has been violated as charged, but it is alleged that the statute law of the State of Texas, under which petitioner was tried and is restrained in his liberty, is unconstitutional and void, in that it is in violation of, repugnant to, and contravenes the interstate commerce clause of the Constitution of the United States.

Thus it will be seen that a direct attack is made upon the constitutionality of our State law which regulates the matter, and the question of its constitutionality is the only one to be determined on this proceeding. We find the statute complained of in chapter XVII, General Laws, called session of the 17th Legislature, pp. 18, 19, *et seq.*, and the particular provision attacked, which is in part an amendment to article 4665, Rev. Stats., reads as follows, viz:

13 "From every commercial traveler, drummer, salesman, or solicitor of trade by sample or otherwise an annual occupation tax of thirty-five dollars, payable in advance: Provided, That the tax herein required to be paid by such commercial traveler, drummer, salesman, or solicitor shall be paid to the comptroller of public accounts, whose receipts, under seal, shall be evidence of the payment of such tax: And provided further, That no county, city, or town shall levy or collect any occupation tax upon such commercial traveler, drummer, salesman, or solicitor: Provided, That nothing herein contained shall apply to any one soliciting subscriptions for religious, literary, or historical books or maps, or to persons soliciting for nurseries, newspapers, and grave stones: Provided further, That every commercial traveler, drummer, salesman, or solicitor of trade shall, on demand of the tax collector of any county of the State or any peace officer of said county, exhibit to such officer the comptroller's receipt above mentioned; and every commercial traveler, drummer, salesman, or solicitor of trade who shall fail or refuse to exhibit said receipt to such officer on demand by him shall be deemed guilty of misdemeanor and fined in a sum not less than twenty-five nor more than one hundred dollars."

This is a general law, and an infraction of its provisions is ex-

pressly declared to be a misdemeanor punishable by fine. Another of our general statutes provides that in misdemeanor cases where a party has been legally tried and fined he may be imprisoned in the county jail until said fine and costs are paid, so that, if the statute in question be constitutional, a party convicted for its violation may suffer conjointly both fine and imprisonment.

It is urgently contended that this statute is in conflict with article 1, section VIII, subdivision 3, of the Constitution of the United States, which declares that Congress shall have the
14 power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and we are most confidently cited by counsel for applicant in support of this position to the case of Robbins *v.* Taxing District of Shelby County, recently decided by the Supreme Court of the United States, March 7th, 1887, in which it was in substance held that "a statute imposing a license tax upon drummers and others selling by sample within a certain taxing district is a regulation of interstate commerce, and therefore unconstitutional as applied to the citizens of other States."

We are free to admit that a majority of the court in that case so held the law to be. We are free to admit that if the decision of the majority be correct it settles the law of this case in favor of the position assumed for applicant. We are further free to admit that, in all cases involving clearly and unquestionably the constitutionality and validity of State laws with reference to provisions of the Constitution of the United States, the decisions of the Supreme Court of the United States, clearly, certainly, and unequivocally expressed upon those questions, should and ought to be binding upon the State courts, because we fully recognize that "it is essential to the protection of the national jurisdiction and to prevent collision between the State and national authority that the final decision upon all questions arising in regard thereto should rest with the courts of the Union" (Cooley's Const., Lim., 5 ed., p. 16); but such decisions, no more than the decisions of the State courts, are or should be binding upon the latter, if, in themselves, unwarranted assumptions of constitutional authority, invocations of the Federal power, where such power does not and never was intended to apply and operate; and, moreover, where said decisions are directly
15 in conflict with well-adjudicated cases of the same court which are not overruled and which, in addition to their equal authority, are based upon fundamental and eternal principles of reason, justice, and right.

We do not propose to enter upon a discussion anew of the delicate and important question of interstate commerce—a question so often and so ably discussed in the debates upon the adoption of the Federal Constitution, when the patent defects of the articles of confederation, intended to be corrected, were directly present in the minds and experience of the framers of that instrument—a question so often discussed, much more ably than we could possibly hope to do, in the many adjudicated cases which have come under judicial investigation in the Supreme, circuit, and district courts of the

United States and courts of last resort in the various States of the Union, as well as in the standard elementary treatises of recognized authority; on the contrary, we shall content ourselves with simply stating certain elementary principles of Government involving the questions, and then cite the authorities bearing directly upon the issue presented in this case.

Mr. Cooley, in his work on the Law of Taxation, says: "The Federal Constitution also provides that Congress shall have the power to regulate commerce with foreign nations and among the several States and with the Indian tribes. The Constitution and the laws made in pursuance thereof being supreme over the several States, the power of the regulation cannot be interfered with, limited, or restrained by any exercise of State authority. When, therefore, it is held that the power to tax is at the discretion of the authority which wields it, a power which may be carried to the extent of an annihilation of that which it taxes, and therefore may defeat and nullify any authority which may elsewhere exist for the pur-
16 pose of protection and preservation, it follows as a corollary that the several States cannot tax the commerce which is regulated under the supremacy of Congress. But a tax on property that may be subject to commerce under congressional regulation is not a tax on commerce." Page 62.

As to the general power of taxation of business, the learned author says: "Government may, in the discretion of its Legislature, levy a tax on every species of property within its jurisdiction; or, on the other hand, it may select any species of property, and tax that only. The same is true of occupations. Government may tax one or it may tax all. There is no restriction upon its power in this regard, unless one expressly imposed by the Constitution." *Id.*, p. 384. Again he says: "A tax on the privilege of following any particular employment is usually confined to those which, in some particular, are exceptional, either because supposed to be specially profitable or because they require special regulations, or because the privilege is in the nature of a franchise, or because they supply a general demand, so that the burden imposed will be generally distributed. But no employment is absolutely exempt from the liability to be taxed. The necessities of the Government may require that the lowest employment, as well as the most lucrative, shall contribute to its support, and if any is exempted motives of policy will govern the discrimination. When the tax takes the form of a tax on the privilege of following an employment, convenience in collecting will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the taxes as a condition to the right to carry on the business at all. In such a case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it." *Id.*, p. 385.

In his invaluable work on taxation Mr. Desty sums up the
17 doctrine thus: "A law imposing a license tax upon transient persons doing business within the State does not violate the provisions of the Federal Constitution. Transient persons selling

goods within the State by wholesale or retail, on land or on water, are liable to pay a license tax. To authorize a person to sell foreign merchandise without a license he must have received it in exchange for articles of his own manufacture or for productions of his own agriculture. The mere fact that a clerk, merchant, or other person solicits orders or favors in his business does not necessarily bring him within the law authorizing a license tax to be imposed upon solicitors. The law means persons engaged in that particular class of business for a profit or as a means of livelihood. * * * A drummer or commercial traveler is not a peddler, because he does not carry with him the goods sold. A State law imposing a license fee upon merchants who go from place to place soliciting orders is not unconstitutional, as involving a duty or impost on imports or a regulation of commerce or unequal taxation. It is a legitimate tax on business." 2 Desty on Taxation, pp. 1389, 1390.

We will now cite some of the State decisions involving this question. In Ward *v.* Maryland, 31 Md., 279, it was held "That it is within the power of the State to tax, in the shape of a license, any trade, business, or occupation, when carried on in its borders by those who are not permanent residents of the State, whether foreigners or citizens of other States; that even if this law is to be regarded as restrictive, as to non-residents, and discriminating, in favor of her own citizens, in its character and design, it still simply imposes a tax upon a particular business carried on in a particular mode within the limits of the State, which it is perfectly competent for the Legislature to regulate and restrain." That case was car-
18 ried to the Supreme Court of the United States and its disposition therein will be noticed hereafter.

In Cole *v.* Randolph, 31 La. Ann., 535, it was held "That the law imposing a license tax on transient persons doing business within the State does not violate that provision of the Constitution of the United States vesting in Congress the exclusive power to regulate commerce among the several States."

In Sears *v.* Board of Commissioners of Warren County, 36 Ind., 267, it was held that the provision contained in "An act concerning licenses to vend foreign merchandise," etc., which required a license fee to be paid by traveling merchants and peddlers who are not residents of the State to vend foreign merchandise, is not in conflict with the interstate commerce clause in the Constitution of the United States.

In Robbins *v.* Taxing District, 13 Lea., 303, it was held that the law providing that drummers and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, and merchandise therein by sample, shall be required to pay a specified privilege tax, is constitutional and valid. This case went to the Supreme Court of the United States and its reversal is the decision applicant relies on here.

Let us now cite some of the leading cases decided in the United States district and circuit courts:

In re Randolph was from the circuit court of the district of Nevada. It was therein held that a statute of Nevada, which provided

that every traveling merchant, agent, or drummer, or other person selling or offering to sell any goods, wares, or merchandise of any kind to be delivered at some future time, or carrying samples and selling or offering to sell goods, wares, or merchandise of any kind similar to such samples, to be delivered at some future time, should procure a license, etc., and further providing that any person pursuing such occupation without license should be guilty of a misdemeanor, did not violate the constitutional provisions relative to laying duties or imposts on imports and interstate commerce. 2 Federal Reporter, 65.

In a most elaborate and well-considered opinion in *Ex parte* Thornton, in the circuit court for the eastern district of Virginia, Hughes, D. J., cites and reviews all the leading cases, and his conclusions, as stated in the syllabus, are: "If the Legislature of a State frames a law relating to merchants and sample merchants with the intention to discriminate against non-residents in favor of residents and against goods in other States sold by sample, in favor of goods held within the State for sale, and if the legislation has this practical effect, then such provisions are null and void and all arrests and prosecutions under these are illegal. The Legislature has the right to discriminate against sample merchants in favor of merchants, the State being the sovereign mistress of her own policy in determining what classes she shall levy a license tax upon and what classes she shall exempt from such taxation and deciding how lightly or how heavily she shall make such tax. The assumption that a merchant is necessarily a resident and that a sample merchant is necessarily a non-resident is an arbitrary one and one which a court of justice has no right, by mere inference, to accept as true. It is only when a law discriminates against a foreign resident of a certain class or against the goods held in another State for sale in favor of a resident of the same class and goods held within the State for sale that it is obnoxious to the provisions of the National Constitution in relation to the privileges and immunities of citizens of the several States or the regulation of commerce with foreign nations and among the several States or the prohibition of laying impost or duties on exports or imports." 12 Federal Reporter, 529.

In Memphis and Little Rock R. Company *v.* Nolan, circuit court western dist. of Tennessee, it was held that "a license or privilege tax imposed by a State on the business of an express company engaged solely in commerce between the States, where there is no intention by this means to obstruct or prohibit the business, is not unconstitutional." The learned judge, delivering the opinion, says: "As I read the cases the principle is that so long as it is not a direct tax on property carried in the commerce between the State, imposed either on the goods or indirectly collected from them, and is only a tax on the franchise granted to the carrier in consideration of the grant, or, what is the same thing, a tax or tribute demanded for the privilege of doing business, the prohibition of the Constitution does not apply. Of course, in analogy to our State adjudications, if, under the disguise of taxing a franchise or privilege, the State should undertake, by excessive taxation, to obstruct or prohibit

the business of interstate commerce, the Constitutional provision would protect against it." 14 Federal Reporter, 532.

We might cite many other authorities which, upon principle, are in alignment with the foregoing, taken from elementary authors and from the State and subordinate Federal courts, but these are sufficient to serve to illustrate the unanimity with which the question has been settled in so many various tribunals of standing and ability, inferior to none in the country. Another fact connected with these decisions is the unanimity and confidence with which they cite and rely upon the decisions of the Supreme Court of the United States in support of the conclusions they announce. This becomes passingly singular when the Robbins case, here relied on, states an entirely different and contradictory rule, and that, too, without
21 overruling previous decisions of the same court in diametrical opposition to it.

Let us cite some of these decisions:

In Nathan *v.* Louisiana, Justice McLean says: "Now, the Federal Government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal Government. * * * The taxing power of a State is one of the attributes of sovereignty; and when there has been no compact with the Federal Government or cession of the jurisdiction for the purposes specified in the Constitution this power reaches all the property and business within the State which are not properly denominated the means of the General Government, and, as laid down by this court, may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the legislature to their constituents. If this power of taxation by a State within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired, but the State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions named, is subject to its laws, and also numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation, and there is no Federal power under the Constitution which can impair this exercise of State sovereignty." 8 How., U. S., 73. Same doctrine is declared in City of N. York *v.* Miln, 11 Peters, 102.

In Gibbons *v.* Ogden, 9 Wheat., 203, the court, in commenting on inspection laws, uses this language: "They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Govern-
22 ment, all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, are a component part of this mass. * * * No direct general power over these objects is granted to Congress, and consequently they remain subject to State legislation." See also License Cases, 5 How. U. S., 504.

In Woodruff *v.* Parham, 8 Wallace, 123, it was held that "a uni-

form tax imposed by a State on all sales made in it, whether they be made by citizens of it or citizens of some other State, and whether the goods sold are the produce of that State enacting the law or of some other State, is valid." This doctrine was reaffirmed in Henson *v.* Lott, *Id.*, 148, where the same statute was involved, and after discussing the validity of the statute that profound jurist, Mr. Justice Miller, concludes his opinion by saying: "As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State."

When the case of Ward *v.* Maryland, *supra*, came before the Supreme Court the judgment of the State court was reversed and the act declared invalid, not, indeed, as in contravention of the interstate commerce provision, but because it imposed a discriminating tax upon non-resident traders, trading in the limits mentioned, and that it was, *pro tanto*, repugnant to the Federal Constitution and void. The provision of the Constitution which was violated
23 was that which guaranteed and secured to the citizens of each State all privileges and immunities of citizens in the several States. Const., art. IV, sec. II; 12 Wallace, 418. Mr. Justice Bradley alone dissented, he being of opinion that the act violated the interstate commerce clause, and that it would so do, "although it imposed upon residents the same burden for selling goods by sample as is imposed upon non-residents."

In the subsequent case of Osborne *v.* Mobile, 16 Wallace, 479, opinion by Chief Justice Chase, it is said: "It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal Government in their integrity." He further says, speaking of the decision in case of State tax on railway gross receipts, 15 Wallace, 284: "The whole court agreed that a tax on business carried on within the State and without discrimination between its citizens and the citizens of other States might be constitutionally imposed and collected."

These two last cases are directly in point. They were decided by an unanimous court. They are not overruled in Robbins *v.* The Taxing District, relied upon by applicant in this case. They are directly in conflict with the Robbins case, and the Robbins case is simply the opinion of a majority and not of the whole court. Waite, Chief Justice, in, to our minds, an unanswerable opinion, concurred in by those profound and eminent jurists, Field and Gray, dissented from the doctrine announced. Under such circumstances we do not feel bound by the Robbins decision, and not believing it to be the law of this land we will not consider it as of binding force upon us.

As conclusive as is to our minds the able dissenting opinion of the Chief Justice, there are one or more views of the case which he did not elaborate, and which, in our opinion, should con-
24 demn the doctrine announced.

The strongest position tending to support the doctrine of

the Robbins case is, perhaps, that taken in Brown *v.* The State of Maryland, 12 Wheaton, 419. It was there said: "Any charge on the introduction and incorporation of the articles of commerce into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation and principal object of it is to prescribe the regular means of accomplishing that introduction and incorporation." The result of the reasoning in that case was, says Judge Story, "That whatever restrains or prevents the introduction or importation of passengers or goods into the country authorized and allowed by Congress, whether in the shape of a tax or other charge, or whether before or after their arrival in port, interferes with the exclusive right of Congress to regulate commerce." Dissenting opinion in City of New York *vs.* Miln, 11 Peters, 161.

Now for the application of this doctrine to the Robbins case. In the opinion of a majority of the court it is conceded that the Tennessee law is not obnoxious to constitutional objection, either Federal or State, in so far as the citizens of Tennessee are concerned, and that as to them it may be legally and rigidly enforced—enforced by criminal prosecution accompanied with appropriate fines and penalties; in other words, that as to the citizens of Tennessee it matters not that the action of the State may allow them to restrain and prevent the introduction of goods into the country and be valid, the same action is invalid as to citizens of other States, merely because they are citizens of other States. Such doctrine, to say the least of it, is anomalous, if not paradoxical.

Again, as stated in the beginning of this opinion, our
25 statute makes it a misdemeanor for a person to pursue the occupation of drummer, commercial traveler, or salesman by sample without having first paid a license therefor. To do so is a criminal offense. In the Robbins case, under a law of similar character, it is conceded the State had the right to pass and enforce such law against its own citizens, but the startling doctrine is announced that this same law is invalid and unconstitutional and incapable of enforcement as to persons not citizens of the State who invade its territory and wantonly violate said law within its jurisdiction; in other words, that a general law of a State, penal in character and violative of neither the Federal or State constitution, is binding upon none save its own citizens.

We have been accustomed to accept as elementary truth the doctrine that criminal laws are not respectors of persons, nor indeed can it be, and that as to them no class of individuals may claim special immunity. Upon this subject the Supreme Court of the United States, in the City of New York *vs.* Miln, emphatically say: "No one will deny that a State has a right to punish any individual found within its jurisdiction who shall have committed an offense within its jurisdiction against its criminal laws. We speak not here of foreign embassadors, as to whom the doctrines of public law apply. We suppose it to be equally clear that a State has as much right to guard by anticipation against the commission of an offense against its laws as to inflict punishment upon the offender after it

shall have been committed. The right to punish or to prevent crime does in no degree depend upon the citizenship of the party who is obnoxious to the law."

The Constitution of the United States provides: "The citizens of each State shall be entitled to all the privileges and immuni-
26 ties of citizens in the several States." The doctrine of the Robbins case goes further. It puts a premium upon non-citizenship by discriminating in its favor against citizenship and conferring upon it privileges and immunities which are denied to the citizens of the State; to such a doctrine we cannot yield our assent.

In conceding that the Tennessee law was constitutional and binding as to the citizens of that State, it occurs to us that the majority opinion in the Robbins case virtually and in fact conceded whatever of merit there was in any question involved in that case on the appeal, and that the concession and conclusion reached are directly at variance. To nullify such a State law by judicial action is, in our opinion, to exercise, to say the least, a doubtful power, if it is not a direct usurpation of unauthorized power, warranted neither by the letter nor the spirit of the constitutional provision invoked to sustain it.

The fact that the law may and does affect more citizens of other States than of the individual State is no criterion by which to judge of its constitutionality or validity. Whenever her own citizens are or may be equally affected we deny that courts of Federal jurisdiction may question the motives of the State Legislature in the passage of the act, much less declare it unconstitutional.

The statute we are construing and which, in this proceeding, we are asked to hold unconstitutional is a general law of equal application to the entire State, and, *pro tanto*, is less objectional than the Tennessee law, which applied only to a taxing district. It would, in our judgment, be a strained construction which would hold this law unconstitutional within the spirit, much less the letter, of the provision of the Federal Constitution regulating commerce between the States.

27 So believing, we are of opinion that the relator is not illegally restrained of his liberty by virtue of his conviction and imprisonment for a violation of this law. He is, therefore, remanded to the custody of the sheriff of Harris county, and it is ordered that applicant pay all the costs incurred in this court by reason of this proceeding.

Ordered accordingly.

28 The State of Texas to the sheriff of Harris county, Greeting:

Before our court of appeals, on the 22d day of June, A. D. 1887, the case upon writ of error to reverse or revise your judgment between *Ex parte* Wm. G. Asher *vs.* The State of Texas was determined, and therein our said court of appeals made its order in these words: No. 5565–5. On this day came on to be heard the application for bail of the relator, William G. Asher, and the same being inspected because it is the opinion of this court that said relator, Wm.

G. Asher, is legally held in custody by the sheriff of Harris county, it is ordered, adjudged, and decreed by this court that said application be not granted and that said relator, William G. Asher, be remanded to the custody of the said sheriff of Harris county. It is further ordered that said relator, Wm. G. Asher, pay all costs of these proceedings in this court expended, for which let execution issue, and that this decision be certified below for observance. To which judgment said relator, by his attorney, in open court, excepts, and in open court gives notice of appeal to the Supreme Court of the United States.

Wherefore we command you to observe the order of our said court of appeals in this behalf and in all things have it duly recognized, obeyed, and executed.

Witness the Hon. John P. White, presiding judge of our said court of appeals, with the seal thereof annexed, at the city of Austin, this 22nd day of June, A. D. 1887.

[Seal Court of Appeals of Texas.]

JAMES L. WHITE, *Clerk.*

29 To the Honorable John P. White, presiding judge of the court of appeals of the State of Texas:

The petition of Wm. G. Asher, a citizen of the State of Louisiana, most respectfully represents and complains that in the records and proceedings and also in the rendition of a judgment in a certain cause entitled "*Ex parte* Wm. G. Asher," lately brought before the honorable court of appeals of the State of Texas, and an original writ of *habeas corpus* rendered in said cause by said court on the 22nd day of June, A. D. 1887, the said court of appeals adjudged and decreed as follows:

This is an original application to this court for the writ of *habeas corpus*, in which it is alleged that the applicant is illegally restrained of his liberty for failure and refusal to pay a fine of $35.00 imposed upon him by a justice of the peace of Harris county on the charge of pursuing the occupation of commercial traveler, drummer, or solicitor of trade by sample without having paid the occupation tax prescribed by law on said occupation. It is admitted that the applicant is a citizen of Louisiana, and that he did pursue such occupation in Harris county, State of Texas, without having paid said occupation tax. It is admitted that the law has been violated as charged; but it is alleged that the statute law of the State of Texas, under which petitioner was tried and is restrained in his liberty, is unconstitutional and void, in that it is in violation of, repugnant to, and contravenes the interstate commerce clause of the Constitution of the United States. * * * We find the statute complained of contained in chapter 17, General Laws, called session of the Seventeenth Legislature, pp. 18, 19 *et seq.* * * * It is urgently contended that this statute is in conflict with article 1,
30 section 8, subdivision 3, of the Constitution of the United States, which declares that Congress shall have power to regulate commerce with foreign nations and among the several States and

with the Indian tribes; and we are most confidently cited by counsel for applicant, in support of this position, to the case of Robbins *vs.* Taxing District of Shelby County, recently decided by the Supreme Court of the United States, March 7, 1887, in which it was, in substance, held that a 'statute imposing a license tax upon drummers and others selling by sample within a certain taxing district is a regulation of interstate commerce, and therefore unconstitutional as applied to citizens of other States.' We are free to admit that a majority of the court in that case so held the law to be. We are free to admit that if the decision of the majority be correct it settles the law of the case in favor of the position assumed for applicant; * * * but such decisions, no more than the decisions of the State courts, are or should be binding upon the latter, if in themselves unwarranted assumptions of constitutional authority; invocations of the Federal power where such power does not and was never intended to apply and operate. * * * The statutes we are construing, and which, in this proceeding, we are asked to hold unconstitutional, is a general law of equal application to the entire State, and *pro tanto* is less objectionable than the Tennessee law, which applied only to a taxing district. It would, in our judgment, be a strained construction which would hold this law unconstitutional within the spirit, much less the letter, of the provision of the Federal Constitution regulating commerce between the States.

"So believing, we are of opinion that the relator is not
31 illegally restrained of his liberty by virtue of his conviction and imprisonment for a violation of this law. He is, therefore, remanded to the custody of the sheriff of Harris county, and it is ordered that applicant pay all costs incurred in this court by reason of this proceeding."

Your petitioner avers that under the law as laid down and held by the Supreme Court of the United States in the aforesaid cause of Robbins *vs.* Taxing District of Shelby County he was not liable for the payment of a tax as a commercial traveler or drummer soliciting trade in Texas, and that manifest error hath occurred in the aforesaid judgment in said cause, to the great damage of your said petitioner.

That in said cause was drawn in question the construction of a clause of the Constitution of the United States, and the said decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution of the United States, and that manifest error hath happened, to the great damage of your petitioner.

That the said court of appeals of the State of Texas is the highest court of law or equity in the State of Texas in which a decision could be had in the said cause, and that said judgment was final in said cause.

Wherefore your petitioner, the said Wm. G. Asher, prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States; and prays for all other and further relief.

JOHN A. KIRLICKS,
Att'y for Petitioner, Wm. G. Asher.

32 AUSTIN, TEXAS, *August 9th*, 1887.

The above and foregoing petition of W. G. Asher for a writ of error to the Supreme Court of the United States for a revision of the judgment of the court of appeals of the State of Texas in the case therein mentioned is allowed and granted, and the said applicant will be released from custody until a final judgment is rendered in said Supreme Court upon said writ upon the execution by him, the said applicant, Asher, of a bond, with sufficient sureties, in the sum of two hundred and fifty dollars, $250.00, conditioned as the law requires, to be approved by the undersigned.

JOHN P. WHITE,
Presiding Judge, Court of Appeals of Texas.

Endorsed: *Ex parte* Wm. G. Asher. Relator's petition for a writ of error to the Supreme Court of the United States. Filed, court of appeals, Aug. 17, 1887, Austin, Texas. James L. White, clerk, by John Oxenford, deputy. John A. Kirlicks, counsel for Asher.

33 In Court of Appeals of the State of Texas.

Ex parte WM. G. ASHER. No. 5565.

Know all men by these presents that we, Wm. G. Asher, as principal, and Isaac R. Frask and W. E. Schueppe, as sureties, are held and firmly bound unto the State of Texas in the sum of two hundred and fifty dollars, to be paid unto the said State of Texas; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this the 13th day of August, A. D. 1887.

Whereas the above-named Wm. G. Asher hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the court of appeals of the State of Texas: Now, therefore, the condition of this obligation is such that if the above-named Wm. G. Asher shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be null and void; otherwise to remain in full force and virtue.

WM. G. ASHER.
ISAAC R. FRASK.
W. E. SCWEPPE.

Witness:
M. J. BOSWELL.

AUGUST 17TH, 1887.

The above writ of error bond is approved.

JOHN P. WHITE,
Presiding Judge, Court of Appeals of Texas.

34 STATE OF MISSOURI, } ss:
City of St. Louis, }

Isaac R. Frask, being duly sworn according to law, states that he is president of the Frask Fish Co., of St. Louis, Mo., and that he is worth, free of all or any incumbrances, the sum of two hundred and fifty dollars—$250.00—or more.

ISAAC R. FRASK.

Subscribed and sworn to before me this 13th day of August, 1887.

FRANK WYMAN,
Notary Public.

STATE OF MISSOURI, } ss:
City of St. Louis, }

William E. Schweppe, being duly sworn according to law, states that he is president of the Schweppe Grocery Co. of St. Louis, Mo., and that he is worth, free of all or any incumbrances, the sum of two hundred and fifty dollars—$250.00—or more.

W. E. SCHWEPPE.

Subscribed and sworn to before me this 13th day of August, 1887.

FRANK WYMAN,
Notary Public.

Endorsed: No. 5565. 5th ass't. *Ex parte* Wm. G. Asher. Writ of error bond. Filed, court of appeals, Aug. 17, 1887, Austin, Texas. James L. White, cl'k, by John Oxenford, deputy.

35 THE STATE OF TEXAS, *County of Travis:*

I, James L. White, clerk of the court of appeals, Austin branch, do hereby certify that the foregoing thirty-four pages contain a true and correct transcript of the record on file in said court in cause No. 5565, *Ex parte* Wm. G. Asher, as evidenced by the orders entered and papers filed in said cause.

Given under my hand and the seal of said court, at the city of Austin, this 9th day of Sept., A. D. 1887.

[Seal of Court of Appeals of Texas.]

JAMES L. WHITE,
Clerk Court of Appeals.

36 [Endorsed:] No. 5565. *Ex parte* Wm. G. Asher, plaintiff in error, *vs.* The State of Texas, defendant in error. Texas court of appeals. Filed June 9th, 1887.

37 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the court of appeals of the State of Texas, holding sessions at Austin, in said State, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals

before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said proceeding entitled *Ex parte* Wm. G. Asher, relator, said proceeding being No. 5565 on the docket of said court of appeals, sitting at Austin, in said State, wherein was drawn in question the construction of a clause in the Constitution of the United States, and the said decision was against the right, title, privilege, or exemption specially set up and claimed under such clause of the said Constitution of the United States, a manifest error hath happened, to the great damage of the said Wm. G. Asher, who is plaintiff in error herein, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

38 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court, the twenty-seventh day of August, in the year of our Lord one thousand eight hundred and eighty-seven, and seal of our said circuit court, at Austin, in the one hundred and twelfth year of the Independence of the United States.

[The Seal of the U. S. Circuit Court, Western Dist., Texas.]

SAMUEL HOPKINS,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin,
By E. G. JAMES, *Deputy.*

Allowed.
August 29th, '87.

JOHN P. WHITE,
Presiding Judge, Court of Appeals of Texas.

39 [Endorsed:] In Supreme Court of the United States. *Ex parte* W. G. Asher, relator, *vs.* —— ——, pl'ff in error. Writ of error. To the Supreme Court of the United States. Issued 27th day of August, A D. 1887. Samuel Hopkins, clerk, by E. G. James, deputy. Service accepted on this writ, and the same is filed in court of appeal, at Austin, this 29th day of August, A. D. 1887. James L. White, clerk.

40 United States of America to the State of Texas, Hon. L. S. Ross, Governor of Texas, Hon. J. S. Hogg, attorney general, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein W. G. Asher, relator, is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 27th day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

Test, with seal of court, at Austin, this 27th day of August, A. D. 1887.

[The Seal of the U. S. Circuit Court, Western Dist. Texas.]

SAMUEL HOPKINS,
Clerk of the United States Circuit Court,
West. Dist. of Texas, at Austin,
By E. G. JAMES, *Deputy.*

Service of this writ accepted this Aug. 29th, 1887.

THE STATE OF TEXAS,
By J. S. HOGG, *Att'y Gen.*

Service accepted Sept. 1st, 1887.

L. S. ROSS, *Governor.*

41 [Endorsed:] No. 5565. 5 assignment. In Supreme Court of the United States. *Ex parte* W. G. Asher, relator, pl'ff in error, *vs.* The State of Texas, def'ts in error. Citation in error. Issued 27th day of August, A. D. 1887. Samuel Hopkins, clerk, by E. G. James, deputy. Filed, court of appeals, Sep. 1, 1887, Austin, Texas. James L. White, clerk.

Endorsed on cover: Texas court of appeals. No. 1149. William G. Asher, plaintiff in error, *vs.* The State of Texas. Filed October 10, 1887.

Office Supreme Court U. S.
FILED.
APR 11 1888
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 1149.

WILLIAM G. ASHER,

Plaintiff in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

MOTION FOR ADVANCEMENT OF THE CAUSE.

ABEL CROOK,
JOHN J. McELHONE,
Attorneys for Plaintiff in Error.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE STS., N. Y

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein W. G. Asher, relator, is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 27th day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

Test, with seal of court, at Austin, this 27th day of August, A. D. 1887.

[The Seal of the U. S. Circuit Court, Western Dist. Texas.]

SAMUEL HOPKINS,
Clerk of the United States Circuit Court,
West. Dist. of Texas, at Austin,
By E. G. JAMES, *Deputy.*

Service of this writ accepted this Aug. 29th, 1887.

THE STATE OF TEXAS,
By J. S. HOGG, *Att'y Gen.*

Service accepted Sept. 1st, 1887.

L. S. ROSS, *Governor.*

41 [Endorsed:] No. 5565. 5 assignment. In Supreme Court of the United States. *Ex parte* W. G. Asher, relator, pl'ff in error, *vs.* The State of Texas, def'ts in error. Citation in error. Issued 27th day of August, A. D. 1887. Samuel Hopkins, clerk, by E. G. James, deputy. Filed, court of appeals, Sep. 1, 1887, Austin, Texas. James L. White, clerk.

Endorsed on cover: Texas court of appeals. No. 1149. William G. Asher, plaintiff in error, *vs.* The State of Texas. Filed October 10, 1887.

Office Supreme Court U. S.
FILED.
APR 11 1888
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 1149.

WILLIAM G. ASHER,

Plaintiff in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

MOTION FOR ADVANCEMENT OF THE CAUSE.

ABEL CROOK,
JOHN J. McELHONE,
Attorneys for Plaintiff in Error.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE STS., N. Y

Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 1149.

WILLIAM G. ASHER, Plaintiff in Error,

vs.

THE STATE OF TEXAS.

Motion to Advance the Cause.

And now comes the plaintiff in error, William G. Asher, and shows to this Honorable Court that he has sued out a writ of error to the Court of Appeals of the State of Texas, returnable at the October Term, A. D. 1887, of this Court; that the record of the proceedings in said cause was filed in this Court on the tenth day of October, 1887; that notice of the issuance of said writ and a citation to the State of Texas to appear at the October Term of this Court and defend the same was duly served, as provided by the statute, upon the Attorney-General of said State, on the 29th day of August, A. D. 1887, and upon the Governor of said State on the first day of September, 1887, as appears on page 20 of the printed record now on file. Said writ of error was duly allowed by the Hon. John P. White, Presiding Judge of the Court of Appeals of Texas, on the 29th day of August, 1887, and service of the writ was accepted and the same was filed in the Court of Appeals at Austin, in said State, on the 29th day of August, 1887, as appears on page 19 of the printed record now on file.

Your petitioner respectfully represents that section 3, chapter 17, of the General Laws of the State of Texas, passed at the call session of the 17th Legislature, amending article 4665, chapter 1, title 95, of the Revised Statutes, as amended March 24th, 1881, approved May 4th, A. D. 1882, provides that there shall be levied on and collected from every commercial traveler, drummer, salesmen, or solicitor of trade, by sample or otherwise, an annual occupation tax. Such amended section reads as follows, viz.:

> "From every commercial traveler, drummer, salesman or solicitor of trade, by sample or otherwise, an annual occupation tax of thirty-five dollars, payable in advance: Provided that the tax herein required to be paid by such commercial traveler, drummer, salesman or solicitor, shall be paid to the comptroller of public accounts, whose receipts under seal shall be evidence of the payment of such tax. And provided, further, that no county, city or town, shall levy or collect any occupation tax upon such commercial traveler, drummer, salesman or solicitor. Provided that nothing herein contained shall apply to any one soliciting subscriptions for religious, literary or historical books or maps, or to persons soliciting for nurseries, newspapers and gravestones. Provided, further, that every commercial traveler, drummer, salesman or solicitor of trade, shall, on demand of the tax collector of any county of the State, or any peace officer of said county, exhibit to such officer the comptroller's receipt above mentioned; and every commercial traveler, drummer, salesman or solicitor of trade, who shall fail or refuse to exhibit said receipt to such officer on demand by him, shall be deemed guilty of misdemeanor, and fined in a sum not less than twenty-five nor more than one hundred dollars."

Your petitioner further shows that Article 110, Chapter 5, Title 4 of the Penal Code of the State of Texas provides that "any person who shall pursue or follow any occupation, calling or profession, or do any act taxed by law without first obtaining a license therefor, shall be fined in a sum not less than the amount of the taxes so due, and not more than double that sum."

Your petitioner further shows that he is a resident and citizen of the City of New Orleans, State of Louisiana, and on the 27th day of May, A. D. 1887, and for about the period of one month prior thereto, was engaged in the business of soliciting trade by the use of

samples for the house for which he worked as drummer in the City of Houston, Harris County, State of Texas, said house being Chas. G. Schultze, of New Orleans, Louisiana, who was a manufacturer of rubber stamps and stencils, for the sale of which said Asher was then and there soliciting orders or trade. While engaged in the act of drumming for said Charles G. Schultze, and for the claimed offense of not having taken out the required license for so doing said business, the defendant, William G. Asher, was arrested by one George Ellis, Sheriff of said County of Harris, State of Texas, and carried before the Hon. James A. Breeding, a Justice of the Peace of Precinct No. 1 of said County of Harris, State of Texas, and fined for the offense of pursuing the occupation of drummer without a license. The said Charles G. Schultze (petitioner's employer) is engaged in New Orleans, Louisiana, in manufacturing and selling rubber stamps and stencils, and it was for the sale of a line of such articles that your petitioner was drumming at the time of his arrest; and your petitioner was soliciting orders and making sales for his said non-resident employer in the County of Harris, State of Texas (Printed Record, p. 5).

Your petitioner further shows that thereupon he sued out a writ of habeas corpus returnable before the Honorable Court of Appeals to the Austin Term, A. D. 1887. Your petitioner claimed in his petition for said writ, and at the hearing upon the return of the same, that the act of the call session of the Legislature of the State of Texas, hereinbefore specifically designated, was a regulation of " commerce among the States," in so far as it was attempted to enforce the provisions thereof upon and against your petitioner. Your petitioner averred that the said statute law of the State of Texas contravenes the Constitution of the United States, and is in violation of and repugnant to the inter-State commerce clause of the Constitution of the United States and the laws of Congress passed thereunder, and therefore unconstitutional as applied to the citizens of other States, and especially as applied to your petitioner (Printed Record, pp. 1 and 2).

Your petitioner further shows that upon a hearing of the writ he was remanded to the custody of the Sheriff of Harris County by the Court of Appeals of Texas (Printed Record p. 15).

Your petitioner further shows that he has given bonds with sufficient sureties, upon which he was released from actual custody until a final judgment is rendered in this Court upon the writ of error (Printed Record, p. 17), and is not now in the actual custody of

the Sheriff of the County of Harris, State of Texas, and restrained o his liberty on account of his failure and refusal to comply with the foregoing provisions of chapter XVII. of the general laws of the call session of the 17th Legislature, being an amendment of article 4665, chapter I., title 95, of the Revised Statutes of the State of Texas (pp. 18, 19, *et seq.* of said general laws). (Printed Record, pp. 3 and 6.)

Your petitioner alleges that the act of the Legislature of Texas herein referred to is void in so far as it is sought to be enforced against him, being a regulation of " commerce among the States," and an interference with the exclusive power and authority of Congress as established by the Constitution of the United States and the acts of Congress passed in pursuance thereof.

Your petitioner alleges that said article 4665 complained of is highly penal in character, in that a commercial traveler, drummer, salesman, or solicitor of trade by sample or otherwise, pursuing his occupation without obtaining from the State of Texas a license therefor, is made guilty of a misdemeanor and is finable in a sum not less than twenty-five dollars nor more than one hundred dollars, upon the demand of the tax collector of any county in the State, or of any peace officer of said county, upon failure to exhibit to such officer on demand, the receipt of the Comptroller of Public Accounts showing the payment of the license tax. And further, that article 110, chapter 5, title 4, of the Penal Code of the State of Texas, also complained of, is highly penal in its character in that it provides that a person pursuing an occupation or doing any act taxed by law without first obtaining a license is finable by a sum not less than the taxes due and not more than double that sum. And further, that in the general statutes of the State of Texas it is provided that in misdemeanor cases where a party has been regularly tried and fined he may be imprisoned in the county jail until said fine and costs are paid (Printed Record, pp. 5, 6 and 7).

Your petitioner alleges that the record shows that in said cause there was drawn in question the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution and Laws of the United States, and that the decision of the highest Court of law and equity in the State of Texas was in favor of the validity of said statute, wherein a right, privilege or immunity was claimed under the Constitution and Laws of the United States, and the decision was against the right, privilege, or immunity set up or claimed under such Constitution and Laws.

Your petitioner therefore prays that this Honorable Court will advance the cause on its docket, it being a criminal case, and upon a writ of error to revise the judgment of the Court of Appeals of Texas, and set an early date at which the same may be heard.

This application for the advancement of the cause is made in accordance with section 710 of the Revised Statutes of the United States of 1878.

All of which is respectfully submitted.

ABEL CROOK,
JOHN J. MCELHONE,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
SEP 28 1888
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 1149.

WILLIAM G. ASHER, PLAINTIFF IN ERROR,

vs.

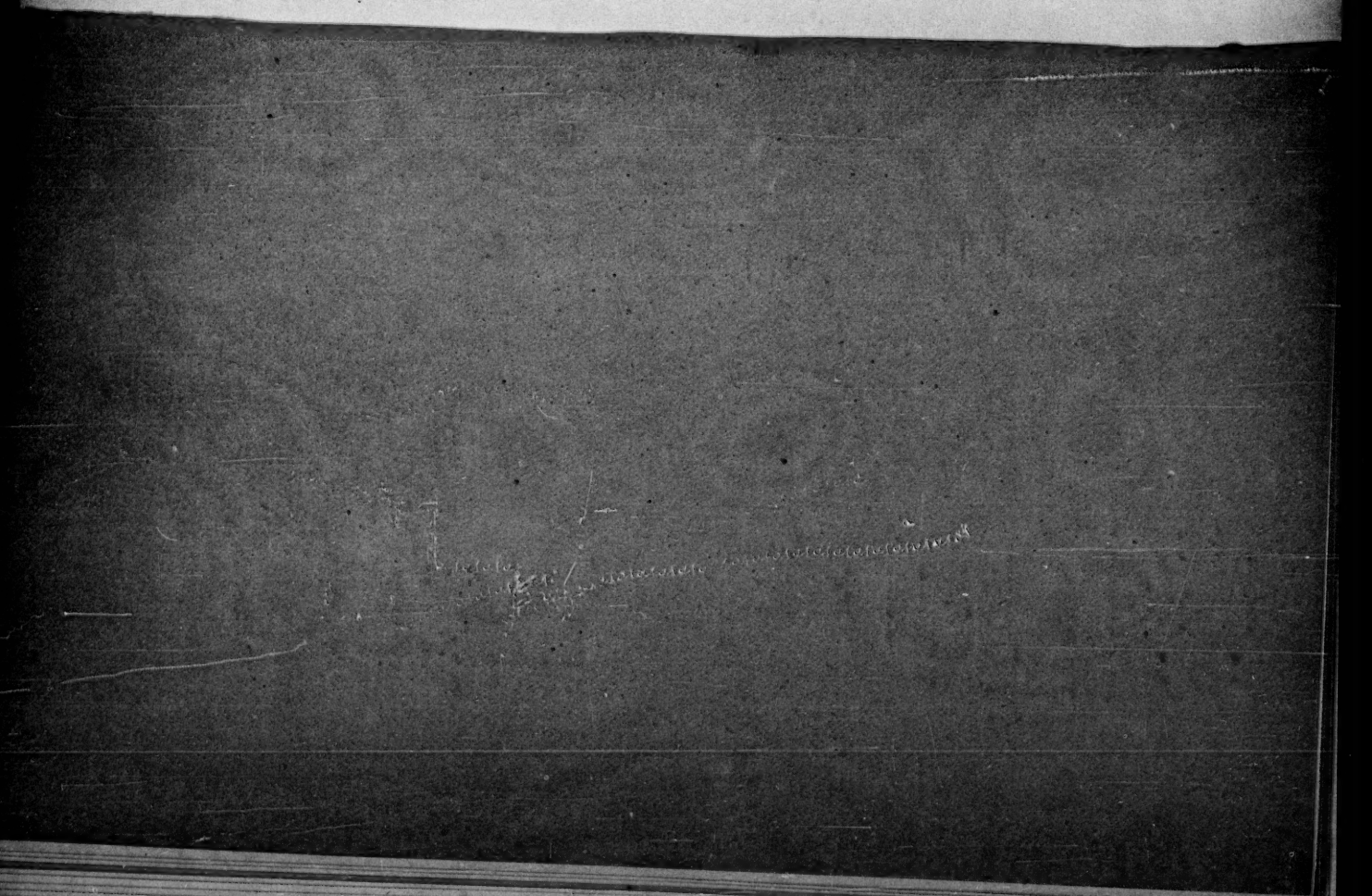
THE STATE OF TEXAS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

BRIEF OF PLAINTIFF IN ERROR.

ABEL CROOK,
JOHN J. McELHONE,
Of Counsel for Plaintiff in Error.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.



Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 1149.

WILLIAM G. ASHER,
Plaintiff in Error,

vs.

THE STATE OF TEXAS.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

The writ of error in this case was brought to review the final judgment of the Court of Appeals of the State of Texas, rendered by said Court June 22, 1887 (reported 23 Texas Ct. Appeals R., 662), determining that the plaintiff in error, William G. Asher, is legally held in custody by the Sheriff of Harris County for an alleged violation of the laws of the State of Texas imposing an occupation tax on commercial travelers, and that his application for discharge upon a writ of *habeas corpus* be not granted, and that he be remanded to the custody of the Sheriff of Harris County (p. 15, Record).

Section 3, Chapter 17, of the General Laws of the State of Texas, passed at the call session of the 17th Legislature, amending Article 4665, Chapter 1, Title

95, of the Revised Statutes, as amended March 24th, 1881, approved May 4th, A. D. 1882, provides that there shall be levied on and collected from every commercial traveler, drummer, salesman or solicitor of trade, by sample or otherwise, an annual occupation tax. Such amended section reads as follows, viz.:

> "From every commercial traveler, drummer, salesman or solicitor of trade, by sample or otherwise, an annual occupation tax of thirty-five dollars, payable in advance: Provided that the tax herein required to be paid by such commercial traveler, drummer, salesman or solicitor, shall be paid to the Comptroller of public accounts, whose receipts under seal shall be evidence of the payment of such tax. And provided, further, that no county, city or town shall levy or collect any occupation tax upon such commercial traveler, drummer, salesman or solicitor. Provided that nothing herein contained shall apply to any one soliciting subscriptions for religious, literary or historical books or maps, or to persons soliciting for nurseries, newspapers and gravestones. Provided, further, that every commercial traveler, drummer, salesman or solicitor of trade shall, on demand of the tax collector of any county of the State, or any peace officer of said county, exhibit to such officer the Comptroller's receipt above mentioned; and every commercial traveler, drummer, salesman or solicitor of trade who shall fail or refuse to exhibit said receipt to such officer on demand by him shall be deemed guilty of misdemeanor and fined in a sum not less than twenty-five nor more than one hundred dollars."

Article 110, Chapter 5, Title 4, of the Penal Code of the State of Texas provides that "any person who shall pursue or follow any occupation, calling or profession,

or do any act taxed by law without first obtaining a license therefor, shall be fined in a sum not less than the amount of the taxes so due, and not more than double that sum.

Plaintiff in error is a resident and citizen of the City of New Orleans, State of Louisiana, and on the 27th day of May, A. D. 1887, and for about the period of one month prior thereto, was engaged in the business of soliciting trade by the use of samples for the house for which he worked as drummer in the City of Houston, Harris County, State of Texas, said house being Chas. G. Schultze, of New Orleans, Louisiana, who was a manufacturer of rubber stamps and stencils, for the sale of which said Asher, plaintiff in error, was then and there soliciting orders or trade. While engaged in the act of drumming for said Charles G. Schultze, and for the claimed offense of not having taken out the required license for so doing said business, plaintiff in error, William G. Asher, was arrested by one George Ellis, Sheriff of said County of Harris, State of Texas, and carried before the Hon. James A. Breeding, a Justice of the Peace of Precinct No. 1 of said County of Harris, State of Texas, and fined for the offense of pursuing the occupation of drummer without a license. The said Charles G. Schultze, employer of plaintiff in error, is engaged in New Orleans, Louisiana, in manufacturing and selling rubber stamps and stencils, and it was for the sale of a line of such articles that Asher was drumming at the time of his arrest; and he was soliciting orders and making sales for his said non-resident employer in the County of Harris, State of Texas (Printed Record, p. 5).

Thereupon plaintiff in error sued out a writ of habeas corpus returnable before the Honorable Court of Appeals to the Austin Term, A. D. 1887, claiming in his petition for said writ, and at the hearing upon the return of the same, that the act of the call session of the Legislature of the State of Texas, hereinbefore specifi-

cally designated, was a regulation of "commerce among the States," in so far as it was attempted to enforce the provisions thereof upon and against him, and averred that the said statute law of the State of Texas contravenes the Constitution of the United States, and is in violation of and repugnant to the inter-State commerce clause of the Constitution of the United States and the laws of Congress passed thereunder, and therefore unconstitutional as applied to the citizens of other States (Printed Record, pp. 1 and 2).

Upon a hearing of the writ he was remanded to the custody of the Sheriff of Harris County by the Court of Appeals of Texas (Printed Record, p. 15).

Assignment of Errors.

I. The Court of Appeals of Texas erred in adjudging that William G. Asher (the plaintiff in error) is legally held in custody by the Sheriff of Harris County.

II. The Court of Appeals of Texas erred in its order, judgment and decree that the application of William G. Asher for a discharge upon a writ of *habeas corpus* be not granted.

III. The Court of Appeals of Texas erred in its order remanding William G. Asher to the custody of the Sheriff of Harris County.

IV. The Court of Appeals of Texas erred in its order that William G. Asher pay all costs of the proceedings against him in said Court of Appeals expended, and in directing execution to issue.

V. The Court of Appeals of Texas erred in that it did not reverse the judgment rendered by James A. Breeding, Justice of the Peace of Precinct No. 1 of Harris County, May 28, 1887, whereby William G.

Asher was convicted of the offence of pursuing his occupation without a license, and the Sheriff of Harris County was commanded to take the body of William G. Asher and him safely keep until the fine and costs imposed by said Justice be paid.

VI. The Court of Appeals of Texas erred in declining to hold that Section 3, Chapter 17 of the general laws of the State of Texas, passed at the call session of the seventeenth Legislature, amending Article 4665, Chapter 1, Title 95, Revised Statutes, as amended March 24, 1881, and approved May 4th, A. D. 1882, contravenes the Constitution of the United States, and is in violation of and repugnant to the interstate commerce clause of the Constitution of the United States and the laws of Congress passed thereunder, and therefore unconstitutional as applied to citizens of other States, and especially as applied to the plaintiff in error.

VII. The Court of Appeals of Texas erred in declining to hold that Article 110, Chapter 5, Title 4 of the Penal Code of the State of Texas, contravenes the Constitution of the United States, and is in violation of and repugnant to the interstate commerce clause of the Constitution of the United States and the laws of Congress passed thereunder, and unconstitutional as applied to citizens of other States, and especially as applied to the plaintiff in error.

POINTS.

First. The stipulation printed at page 5, Record, establishes the following facts :

1. Asher is a resident and citizen of the City of New Orleans and State of Louisiana.

2. At the time of his arrest he was engaged in the business of soliciting trade by the use of samples for the house of Charles G. Schulze, of New Orleans, Louisiana.

3. Asher's arrest was for the claimed offense of "drumming" within the State of Texas for said Schulze without having taken out a license from the State of Texas for the transaction of such business.

4. The laws of Texas provide that an occupation tax shall be levied on and collected from every commercial traveler, drummer, salesman or solicitor of trade, by sample or otherwise; and that any person pursuing any occupation taxed by law without first obtaining a license, is guilty of a misdemeanor and shall be fined, and such fine may be enforced by imprisonment.

Second. The State possesses the power to impose an occupation tax without discrimination upon its own citizens who continuously carry on local business within the State, but the statute imposing such tax when applied to the citizens of other States soliciting trade by sample for manufacturers or dealers who are citizens of and domiciled in other States, contravenes the interstate commerce clause of the Constitution of the United States, is an unauthorized interference with the power of Congress, and to this extent is unconstitutional.

1. In Ward vs. Maryland, 12 Wallace, 118, the U. S. Supreme Court held the statute of Maryland to be unconstitutional because it discriminated against nonresidents. Justice BRADLEY, in his opinion, urges that the law would have been equally unconstitutional "al- "though it imposed upon residents the same burden "by selling goods by sample as is imposed on the non-

" residents. Such a law would effectually prevent the " manufacturers of the manufacturing States from sell- " ing their goods in other States unless they established " commercial houses therein, or sold to resident mer- " chants who chose to send them orders. It is, in fact, " a duty upon importation from one State to another, " under the name of a tax."

2. In Robbins vs. Taxing District of Shelby County, Tennessee, 120 U. S. R., 489, the statute of Tennessee applicable to the Taxing District of Shelby County (formerly Memphis) was held unconstitutional, upon a statement of facts substantially identical with those now presented.

The statute of Tennessee enacted, among other things, that " All drummers and all persons not having " a regular licensed house of business in the Taxing Dis- " trict offering for sale or selling goods, wares or mer- " chandise therein, by sample, shall be required to pay " to the County Trustee the sum of ten dollars ($10) " per week, or twenty-five dollars per month, for such " privilege, and no license shall be issued for a longer " period than three months " (Act of 1881, C. 96, § 16).

The facts as quoted in the opinion of Justice BRADLEY were as follows :

> " Sabine Robbins is a citizen and resident of " Cincinnati, Ohio, and on the day of " , 1884, was engaged in the busi- " ness of drumming in the Taxing District of " Shelby County, Tennessee—*i. e.*, soliciting trade " by the use of samples for the house or firm for " which he worked as a drummer, said firm being " the firm of ' Rose, Robbins & Co.,' doing business " in Cincinnati, and all the members of said firm " being citizens and residents of Cincinnati, Ohio. " While engaged in the act of drumming for said " firm, and for the claimed offense of not having

"taken out the required license for doing said "business, the defendant, Sabine Robbins, was ar- "rested by one of the Memphis or Taxing District "police force and carried before the Hon. D. P. "HADDEN, president of the Taxing District, and "fined for the offense of drumming without a li- "cense. It is admitted the firm of 'Rose, Rob- "bins & Co.' are engaged in the selling of paper, "writing materials and such articles as are used in "the book stores of the Taxing District of Shelby "County, and that it was a line of such articles, "for the sale of which the said defendant herein "was drumming at the time of his arrest."

The stipulation in *the present Asher case* (Subdiv. 3d, p. 5, Record) is in the following language:

"Wm. G. Asher is a resident and citizen of the "City of New Orleans, State of Louisiana, and on "the 27th day of May, A. D. 1887, and for about "the period of one month prior thereto, was en- "gaged in the business of soliciting trade by the "use of samples, for the house for which he worked "as drummer, in the City of Houston, Harris "County, State of Texas, said house being Charles "G. Schulze, of New Orleans, Louisiana, who was "a manufacturer of rubber stamps and stencils, "for the sale of which said Asher was then and "there soliciting orders or trade. While engaged "in the act of drumming for said Charles G. "Schulze, and for the claimed offense of not hav- "ing taken out the required license for so doing "said business, the defendant, Wm. G. Asher, was "arrested by one Geo. Ellis, Sheriff of said County "of Harris, State of Texas, and carried before the "Hon. JAMES A. BREEDING, a Justice of the Peace "of Precinct No. 1 of said County of Harris, State "of Texas, and fined for the offense of pursuing

" the occupation of drummer without a license.
" It is admitted that Charles G. Schulze is engaged
" in manufacturing in New Orleans, State of
" Louisiana, and in selling rubber stamps and
" stencils, and that it was a line of such articles for
" the sale of which the said defendant, Wm. G.
" Asher, was drumming at the time of his arrest;
" that the relator, Asher, was soliciting said orders
" and was making said sales for his said non-resi-
" dent employers in the County of Harris and in
" the State of Texas."

The Asher stipulation, therefore, differs from the Robbins stipulation in that it appears that Asher had been pursuing his occupation as drummer in the State in which he was arrested for the period of about one month prior to such arrest, while in the Robbins case the period in which he had been pursuing his occupation as drummer is not stated.

3. Corson vs. State of Maryland, decided by the Supreme Court at the same term, and reported with the Robbins case, held a similar statute of Maryland unconstitutional.

4. *In Re* William J. Hennick, reported Vol. 1, Interstate Commerce R., 66, the Supreme Court of the District of Columbia, following the doctrine of the Robbins case, held unconstitutional the act of the late Legislative Assembly of the District of Columbia, imposing a license tax upon commercial agents or drummers " whose business it is as agents for non-resident manufacturers or wholesale dealers, to offer for sale merchandise."

5. In Simmons Hardware Co. vs. Maguire, Sheriff, &c., 2 Southern Reporter, p. 592, the Supreme Court of Louisiana held that Sec. 12 of the Louisiana Act 101

of 188€, which declares "all traveling agents offering any species of merchandise in this State for sale, or selling by sample or otherwise, shall pay a license of $50," to be repugnant to Paragraph 3, Section 8, Article 1 of the Constitution of the United States, so far as such traveling agents represent persons domiciled in other States.

6. In *Ex parte* Rosenblatt, 24 Reporter, 570, the Supreme Court of Nevada held the statute of Nevada passed February 23, 1885, requiring all traveling merchants and merchants doing business through soliciting agents, commonly known as "drummers," to take out a license, to be unconstitutional and void under the commerce clause of the Federal Constitution, as applied to a resident of California offering for sale by sample goods to be delivered by his principal, domiciled in California, notwithstanding that the statute required a like license from State solicitors.

7. In Ficklen vs. Taxing District of Shelby County, 3 Railway & Corporation Law Journal, 579, the Chancery Court of Memphis held that a municipal ordinance imposing a tax of fifty dollars upon resident brokers who do business exclusively as agents of non-resident business houses, is unconstitutional and void, as an attempt to burden interstate commerce with local taxation.

8. In *ex parte* Stockton, 33 Federal Reporter, 95, the U. S. District Court for the Eastern District of Texas, held the Texas statute now under consideration to be unconstitutional.

Stockton, a citizen of Missouri, while engaged in soliciting sales by sample in the County of Smith, in the State of Texas, for his principal, William A. Wilson & Co., of Kansas City, Missouri, was arrested by the Texas authorities, charged with unlawfully pursuing

the occupation of a commercial traveler and with refusal to exhibit to a peace officer "the receipt of the "Comptroller of Public Accounts showing the pay- "ment of the occupation tax due by said Stockton to "said State upon said occupation."

SABIN, J., after quoting the statute, says:

"This law imposes a tax in the first place upon "all drummers, whether acting as agents for citi- "zens of other States in selling their goods therein "to citizens or people of this State in this State, "by samples of such goods or not, and then pro- "vides a penalty for not producing a receipt show- "ing the payment thereof to the Comptroller when "demanded by the proper officer, and failing to "pay such fine or penalty he may be arrested and, "by other laws, be thrown into jail and set to work "on the County farm until he can extinguish the "same through enforced labor at the rates fixed by "law. The object of the penalty is to enforce the "payment of an unlawful tax declared in direct "violation of the Constitution of the United States, "and that failing the penalty of its disobedience "also fails, or, in other words, the entire section is "null and void, the same being in direct violation "of the Constitution of the United States." * * *

"The law in question is utterly void so far as "it affects citizens of other States having no goods "herein but selling herein by sample."

"The following are the authorities relied upon "as settling the law in this case, viz.:

"Robbins vs. Taxing District of Shelby Co., "Tenn., 120 U. S. R., p. 489, *et seq.*

"Fargo vs. Michigan, 121 U. S. R., p. 230 *et seq.*

"Philadelphia and Southern S. S. Co. vs. Penn- "sylvania, 122 U. S. R., p. 326, *et seq.*

9. In Leloup vs. The Port of Mobile, 127 U. S. R.,

540, the Supreme Court held telegraphic communications carried on between different States to be interstate commerce within the power of regulation conferred upon Congress, free from the control of State regulations except such as are strictly of a police character; and State regulations by way of tax on the occupation or business, or requiring a license to transact such businesss, are unconstitutional and void. A general license tax affects the entire business, interstate as well as domestic or internal, and is unconstitutional.

In this case the tax was upon the agent of the company located in Mobile, Alabama, whose principal was a corporation of the State of New York.

Third. The Court of Appeals of Texas bases its dissent from the determination of the Supreme Court in the Robbins case upon the novel ground that the Court was divided in opinion.

Justice WHITE, p. 7, record, conceding the facts to be parallel, says:

"We are free to admit that if the decision of the majority be correct it settles the law of this case in favor of the position assumed for applicant."

Fourth. The judgment of the Court of Appeals of Texas should be reversed, and the plaintiff in error should be discharged.

ABEL CROOK,
JOHN J. MCELHONE,
Of Counsel for Plaintiff in Error.

540, the Supreme Court held telegraphic communications carried on between different States to be interstate commerce within the power of regulation conferred upon Congress, free from the control of State regulations except such as are strictly of a police character; and State regulations by way of tax on the occupation or business, or requiring a license to transact such business, are unconstitutional and void. A general license tax affects the entire business, interstate as well as domestic or internal, and is unconstitutional.

In this case the tax was upon the agents of the company located in Mobile, Alabama, whose principal was a corporation of the state of New York.

Third. The Court of Appeals of Texas bases its dissent from the determination of the Supreme Court in the Robbins case upon the novel ground that the Court was divided in opinion.

Justice White, p. 7, to such concession the facts to be parallel, says:

"We are free to admit that if the decision of the majority be correct it settles the law of this case in favor of the position assumed for applicant."

Fourth. The judgment of the Court of Appeals of Texas should be reversed, and the plaintiff in error should be discharged.

Abel Crook,
John J. McElhone,
Of Counsel for Plaintiff in Error.

No. .....

Supreme Court of the United States.

OCTOBER TERM, 1887.

W. G. ASHER, Plaintiff in Error,

v.

THE STATE OF TEXAS, Defendant in Error.

ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

BRIEF OF THE DEFENDANT IN ERROR.

No. .....

Supreme Court of the United States.

OCTOBER TERM, 1887.

W. G. ASHER, PLAINTIFF IN ERROR,

v.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

BRIEF OF THE DEFENDANT IN ERROR.

This is a writ of error brought by the plaintiff in error against the State of Texas, defendant in error, to relieve himself of a fine of thirty-five dollars, and incidental costs, assessed against him for failing to pay an occupation tax and not taking out a license as a drummer before soliciting orders and making sales of goods in Texas for his employer who resided and did business in New Orleans, in the State of Louisiana. At the time of the sale the plaintiff was in Texas, but he and his employer lived out of Texas. The agreed statement and opinion of the court recite the statute under which the conviction took place and the facts upon which the judgment of the court was based.

It is claimed by the plaintiff in error that the statute under which his conviction took place, levying a tax upon drummers, and requiring them to secure license before engaging in business in the State of Texas, is obnoxious to Art. I, Sec. 8, Part 3, of the Constitution of the United

States, because said tax is a tax on interstate commerce, which proposition is denied by the defendant in error, who in support of this theory cites:

Cooley on Taxation, pp. 62, 384, 385, 392.

2 Desty on Taxation, pp. 1389, 1390, 1393.

License Cases, 5 Howard, 504.

Willson v. Blackbird Creek Marsh Co., 2 Peters, 245.

Cooley v. Wardens, 12 Howard, 315.

Osborne v. Mobile, 16 Wall., 479–483.

Dissenting opinion of Chief Justice Waite in Robbins' case, 120 U. S.

The Constitution of the United States, Art. I, Sec. 8, Part 3, is a limitation upon Congress, and restricts its powers in this direction to a regulation of commerce between or among the States.

Where it is a question of internal commerce or domestic trade of a State, or a right to tax the same or any occupation or privilege within the State, the Constitution of the United States confers no power upon Congress to regulate the same, nor was this power ceded the general government by the States or the people thereof.

License Tax Cases, 5 Wall., 470.

License Cases, 5 Howard, 575.

A regulation of commerce and a taxation are entirely different matters, and "a tax on property that may be the subject of commerce under congressional regulation, is not a tax on commerce."

Commonwealth v. Holbrook, 10 Allen, 202.

Cooley on Taxation, p. 62.

While it is admitted that Congress has the exclusive right to *regulate* commerce "among the States," it is urgently

claimed that as to the levying and collection of taxes it has not *exclusive* jurisdiction, but that that power also belongs to the States, for their own benefit and as one of the rights of sovereignty, and is concurrent in Congress and the States, and may be and is exercised by both at the same time and upon the same subjects, for purposes of revenue.

Cooley on Taxation, pp. 384, 605.

Loughborough v. Bake, 5 Wheaton, 317.

The States may unquestionably tax subjects of commerce, and no necessary conflict with that complete control which is vested in Congress appears until the power is so exercised as to defeat or embarrass the congressional legislation, and where Congress has not acted at all upon the subject the State taxation cannot be invalid on this ground.

Cooley v. Board of Wardens, 12 Howard, 299.

Crandall v. Nevada, 6 Wallace, 35.

Cooley on Cons. Lim., pp. 605, 606.

A State can levy taxes upon business or property of non-residents within that State.

Duer v. Small, 4 Blatchford, 263.

Commonwealth v. Milton, 12 B. Monroe, 212, 218.

Catlin v. Hull, 21 Vermont, 152.

Nathan v. Louisiana, 8 Howard, 73, 82.

Corfield v. Coryell, 4 Wash. Cir. Ct. Repts., 380.

There is no conflict between State and Federal power or jurisdiction where both assume the authority to tax and issue license for revenue purposes, nor does the license or tax receipt by the Federal government supersede the State authority.

"The license issued by the Federal government for revenue purposes does not supersede State regulations, and con-

sequently must be received subject to all such requirements of license fees as the State may have seen fit to impose."

McGuire v. Commonwealth, 3 Wallace, 388.
Purvear v. Commonwealth, 5 Wallace, 475, 480.
Commonwealth v. Thornily, 6 Allen, 445.
Commonwealth v. Keenan, 11 Allen, 262.
Black v. Jeffersonville, 36 Ill., 301.
State v. Carney, 20 Iowa, 82.
State v. Stutz, 20 Iowa, 488.

Either the Federal or State government, or both, can levy and collect license fees as taxes, for revenue, and if either fails to do so it does not preclude the other, nor is the jurisdiction, right, or sovereignty of the other infringed or its domain invaded.

The relegation of "interstate commerce" to the jurisdiction of Congress strengthens the above proposition, because the power of taxation over matters of internal regulation within the States was reserved to the "States respectively or the people thereof," and not delegated to Congress or to the Federal power. Such has been the uniform current of authority from the foundation of our government.

2 Desty on Taxation, pp. 1389–1393, and notes on said pages, authorities cited above.

Nor does this idea militate against that line of decision which under the "interstate commerce" clause of the Constitution guarantees to Congress the power to regulate commerce among the States.

Between the two propositions there is no possible conflict or collision, and the power and right of a State to regulate its own internal commerce and policy is as exclusive in the State as the power and right to regulate commerce among the States is exclusive in the Federal government. This

principle is necessary to adjust and define the powers and preserve the sovereignty of both, and fix the interdependent relations existing between State and Federal power, and show the attitude which the one sustains and bears to the other.

The infringement of the functions of the one by the other is necessarily injurious to both, and destructive of the well adjusted relations and harmony existing between them.

The very fact that Congress has the independent right to tax occupations and other subjects in a State, as well as to regulate commerce among the States, shows that regulation and tax are essentially different matters, and are exercised by virtue of different powers under the Federal Constitution. The one is an interstate matter, while the other is one of revenue. The two ideas are widely variant—they do not coincide. Their initial points are different, their bearings different, their course and distance different—their lines are different. "The power to tax does not in itself involve any power to regulate. The power to regulate is distinct from, and not subordinate to the power to tax. For eign commerce Congress may both regulate and tax. Domestic traffic within the limits of a State it may tax, *but it cannot regulate.* A State law taxing imports or requiring the importer to pay the State for a license before selling them is void, not merely because Congress has levied a duty on them, but because Congress may regulate and authorize and has regulated and authorized their introduction. If the power of Congress to tax what it cannot regulate took away from the State the power of regulation, the extraordinary result would follow that every branch of domestic traffic or employment which Congress should see fit to tax would be removed from all regulation or control whatever.

The power of Congress to tax matters within a State subject to taxation, does not militate against the power of the

State to tax, nor is the power of Congress to tax exclusive. Were this power in Congress exclusive, then the State could not exercise such power at all, and her government would be rendered helpless and could not exercise its own sovereignty, but would be dependent upon Congress for its maintenance, and paternalism would be complete in the Federal government. It is not granted to Congress to say to the States that they cannot or shall not levy and collect taxes within their boundaries, on their own internal matters, for their own support; nor did the States ever grant to the Federal government the power or right to say that the citizens of the different States should be accorded more rights in a given State than the citizens of that State. Nor did they invest the judiciary with such authority.

Nor can the courts by judicial construction invest the Federal government with powers not granted to it by the States in that great bulwark of human rights and palladium of American liberty, the Constitution of the United States.

I am thoroughly persuaded that the authority in the Robbins case was never within the the contemplation of the Convention which framed, or the people who adopted the Constitution.

It is unreasonable to suppose that any State would have agreed voluntarily to surrender to another government the power to confer upon aliens or non-residents within her borders and jurisdiction "privileges and immunities" which in her wisdom she might see fit to deny her own citizens. It is unreasonable to suppose that the framers of the Constitution ever intended to assert or claim such power in the government they were creating, and the guaranteeing of "*equal* privileges and immunities" is as positive an inhibition of such power to confer *greater* privileges and immunities as though it had been expressed in so many words. In view of the implied inhibition in the "equal

privileges and immunities" clause, it is very questionable if Congress even under the "interstate commerce" clause could constitutionally enact such a law. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (United States Cons., Art. X.)

"The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

The Robbins case ignores these two provisions, we submit, and discriminates against citizenship and in favor of non-citizenship. It confers "privileges and immunities" upon non-citizenship not given to citizenship. This is against the letter and spirit of the Constitution. See also Art. IX of the Constitution, which reads as follows: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

In the case of Houston v. Moore, 5 Wheaton, pp. 48, 49, Justice Story says: "The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution; and, on the other hand, we are bound to support that Constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains. The Constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of these being of vital importance also to the State authority and State legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does *per se*, transfer an exclusive sovereignty on such subjects to

the latter. On the contrary a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States unless where the Constitution has *expressly in terms* given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States.

"The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by consent of the Legislature of the State in which the same shall be, for forts, arsenals, etc.; of the second class, the prohibition of a State to coin money or emit bills of credit; of the third class, the power to establish an uniform rule of naturalization and the delegation of admiralty and maritime jurisdiction.

"In all *other cases* not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the XIth Amendment of the Constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of *concurrent* authority, where the laws of the States and of the Union are in *direct* and *manifest collision* on the *same subject*, those of the Union being 'the supreme law of the land,' are of paramount authority, and the State laws, so far, and *so far only*, as such incompatibility exists, must necessarily yield. Such are the general principles by which my judgment is guided in every investigation on constitutional points. I do not know that they have ever been seriously doubted. They commend themselves by their intrinsic equity, and have been amply justified by the opinions of the great men under whose *guidance* the Constitution was framed, as well as by the practice of the government of the

Union. To desert them would be to deliver ourselver over to endless doubts and difficulties, and probably to hazard the existence of the Constitution itself."

Houston v. Moore, 5 Wheaton, 48–50.

Martin v. Hunter's Lessee, 1 Wheaton, 324–326.

The Constitution of the United States may be properly divided into two leading great divisions, to-wit: one as self-executing and complete in itself, and the other executory or incomplete within itself, and which requires the action of Congress to give it vitality and put it into execution or operation. Whenever a question arises under the first it may be properly termed a constitutional question, and is properly a constitutional question, and a law enacted in derogation thereof would be unconstitutional, *per se*. This is not the case as to the executory phase of the Constitution, and where questions arise under this latter proposition it would hardly be contended that the same would be unconstitutional. It becomes a question of legislation and not of constitutional construction. Even from this standpoint the Robbins case did not present a constitutional question.

Again, if this is, as contended for in the Robbins case, a question of "interstate commerce," and the State has yielded the right to tax business carried on within her borders, then we submit the question is one of legislation altogether, and if there could arise a possible collision between Federal and State powers that that emergency has not arisen, inasmuch as the Federal jurisdiction has not attached, because Congress has not legislated on the matter. Until such legislation the State can, from this standpoint, levy and collect the tax complained of. But it has been already seen that the State has delegated no such authority to Congress, and Congress ought not to assume any power unless it is made

clearly to appear that such was within the intention of the Constitution. (Houston v. Moore, 5 Wheat., 48.)

Again, this Court has said "the sovereign powers vested in the State governments by their respective Constitutions remained unaltered and unimpaired, except so far as they were *granted* to the government of the United States." (Martin v. Hunter's Lessee, 1 Wheaton, 325.)

The power to regulate the internal legislation of the respective States, either express or implied, has never been delegated to the Federal government, but was reserved to the respective States, or to the people. No course of judicial construction can delegate powers to Congress not given by the States and people. If terms and powers can be added by construction, then it follows that terms and powers can be eliminated in the same way, and one by one our constitutional guarantees could be construed away, and others construed in their stead and place. Our courts could easily thus not only become makers of our organic and statute law, but could also construe the same out of existence. The executive and legislative branches would soon become subordinate to the judiciary, and the boasted balance of power in the Constitution and in our government would be gone.

The Constitution of the United States does not inhibit the States from levying a tax on occupations, unless the State should discriminate against the citizens of other States. Mr. Cooley says: "Government may in the discretion of its legislature levy a tax on every species of property within its jurisdiction; or, it may select any species of property and tax that only. The same is true of occupations; government may tax one, or it may tax all. There is no restriction upon its power in this regard, unless one *expressly* imposed by the Constitution." (Cooley on Cons. Lim., p. 384.)

He further says: "A tax on the privilege of following any

particular employment is usually confined to those which in some particular are exceptional, either because supposed to be especially profitable, or because they require special regulations, or because the privilege is in the nature of a franchise, or because they supply a general demand; so that the burdens imposed will be generally distributed. But no employment is absolutely exempt from the liability to be taxed. In such a case the business carried on will be illegal, and no recovery can be had upon contracts made in course of it." (Cooley on Cons. Lim., p. 385.)

The right to tax property and privileges is an attribute of govermental sovereignty, and the power of "taxation operates on all persons and property belonging to the body politic." "This is an original principle which has its foundation in society itself." (Cooley on Cons. Lim., p. 598, as copied from the opinion of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat., 428.)

Mr. Desty, in his valuable work on taxation, page 1389 (Vol. II), says: "A law imposing a license tax on transient persons doing business within the State does not violate the provisions of the Federal Constitution."

2 Desty on Taxation, p. 1389.
Cole v. Rudolph, 31 La. Ann., 535.
State v. North, 27 Mo., 464.
State v. Shapleigh, 27 Mo., 344.
Biddle v. Com., 13 Serg. and R., 405.

Again, he says: "Transient persons selling goods within the State, by wholesale or retail, on land or on water, are liable to pay a license tax."

Again: "A State law imposing a license fee upon merchants who go from place to place soliciting orders is not unconstitutional as involving a duty or impost on imports or a regulation of commerce, or unequal taxation."

2 Desty on Taxation, p. 1390.
Colson v. State, 7 Blackford, 590.
Sears v. Comrs., 36 Ind., 267.
In re Rudolph, 2 Fed. Rep., 65.

Again he says, on same page, "it is a legitimate tax on business."

Ex parte Robinson, 12 Nev., 263.
Sledd v. Com., 19 Grat., 813.
2 Desty on Taxation, pp. 1390–1394, and authorities collated from U. S. and State Reports in the forty citation notes on pp. 1393 and 1394.

A State can levy taxes upon business or property of non-residents within the State.

Duer v. Small, 4 Blatch., 263.
Commonwealth v. Milton, 12 B. Monroe, 212–218.
Osborne v. Mobile, 16 Wallace, 479–483.

In the last cited case the validity of the act under consideration "was assailed for the reason that it imposed a burden upon interstate commerce, and was therefore repugnant to the clause of the Constitution which confers upon Congress the power to regulate commerce among the several States;" but it was held that "Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted the right of the State to legislate, in the absence of legislation by Congress, upon subjects over which the Constitution has clothed that body with legislative authority."

Osborne v. Mobile, 16 Wall., 482.
License Cases, 5 Howard, 504.
Willson v. Blackbird Creek Marsh Co., 2 Peters, 245.
Cooley v. Board of Wardens, 12 Howard, 315.

Chief Justice Chase quotes approvingly the following language, to-wit: "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution. (Osborne v. Mobile, 16 Wall., 482.)

Such has been the law from time immemorial, and such has been the law since the foundation of our government.

It occures to counsel that there are marked differences between the Robbins case and the case at bar, but it is not thought necessary here or in this brief to enter into a discussion of them. It is thought sufficient to present the defendant's theory of this case, and the principles that should govern this court in deciding the same.

Defendant in error insists that the decision of this cause by the Honorable Court of Appeals of the State of Texas was and is in perfect harmony with the "interstate commerce" clause of the United States Constitution, the long line of decisions of the courts, the pronounced "law of the land," and the theory and genius of our State and Federal government; and had it rendered any other decision or made a contrary ruling, it would have set at naught the "equal rights" clause of the United States Constitution, as well, it is believed, as that part of the XIVth Amendment, Sec. 1, of said Constitution, which says, among other things, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Had the Texas Legislature passed a statute as indicated by the Robbins case, it would have been repugnant to Art. IV, Sec. 2, Part 1, of the Federal Constitution. With due deference to the opinion of the majority of the court in the Robbins case, it is insisted that the opinion is not supported by the authorities cited, and the propositions as stated in the opinion are not deducible from the citations given and are inapplicable to the question decided.

Authorities already cited.

Osborne v. Mobile, 16 Wall., 479–483.

The decision is obnoxious to Art. IV, Sec. 2, Part 1, of the United States Constitution also, because, if the State is forced by judicial construction to legislate against its own citizens, and for the benefit of non-residents, it is perceived that a harsh and unjust discrimination against her own citizens is had at once. The opinion seems to overlook this result. That portion of the Constitution declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states," and Art. X says "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved* to the States respectively, or to the people."

If the doctrine of the Robbins case is to be hereafter the law of the land, there will arise many serious questions and complications as to the rights of the citizens of the States in the different States.

Under it the non-resident would inevitably enjoy "privileges and immunities" not enjoyed by the citizen. He could pursue occupations, enjoy privileges, free of the burdens of government, while the resident citizen would be burdened with the revenue taxation.

The Federal Constitution guarantees equal rights to all the citizens of all the States in the several States, and it becomes the duty of the courts, and especially of Congress, to protect the citizens of all the States in these rights in the several States.

It is as much the duty of Congress to protect the citizens of Texas in the enjoyment of all their rights in Texas as it is to protect the citizens of other States in Texas, and it is further as much the duty of Congress and the courts to protect the citizens of Texas from discrimination against them in favor of the citizens of other States by Texas, as it is to protect the citizens of other States in Texas from

unjust discrimination against them by Texas in favor of her own citizens.

Can the Federal government allow a State to discriminate against her own citizens any more than against citizens of other States?

As an answer to this it is gravely urged in the Robbins case that "the State is not bound to tax its own drummers, and if it does so, whilst having no power to tax those of other States, it acts of its own free will, and is itself the author of such discrimination." Such an argument is not only fallacious, but surprising.

As well argue that the State is not bound to pass any laws, or collect any revenues, or levy any taxes, or do any act of sovereignty, for fear some citizen of one of the several States might chance to come into that State and engage in some business which would be affected by it.

It occurs to us that the sound, reasonable, and correct doctrine is, that "if a non-resident does not wish to pay for such security and protection [as a State affords] he can withdraw his personal property from the State and thus free himself from such payment. There is no law which compels him to put his property under the protection of the laws of a State of which he is not a citizen or resident. But, while he asks and demands protection from the laws there is no good reason why he should not pay for it, no good reason why he should demand that the property of the resident should pay for it. And there is no higher law of the United States which gives a non-resident a right to demand that the property of the resident citizen should pay for the protection afforded by the laws to the property of the non-resident citizen.

"But such protection cannot be afforded unless means by the way of taxes, are furnished to afford protection. And taxes are no more to be levied upon the property of

the resident to protect the property of the non-resident than taxes are to be levied upon the property of the non-resident to protect the property of the resident." (Duer v. Small, 4 Blatch., Cir. Ct. Repts., 265, 266.)

The non-resident claims the protection of the laws of the resident in his business transactions and his personal and property rights, and is not required to contribute to the burdens of that protection. The non-resident enjoys the benefit of the protection, whilst the resident pays for a protection that discriminates against him in favor of the non-resident. Is this justice, or law? The provisions of the Federal Constitution guaranteeing *equal* rights, privileges, and immunities to the citizens of the several States in each of the States, carries with it inevitably and to the same extent the converse of the proposition, that *greater* rights, privileges, and immunities cannot be conferred upon the citizens of the several States in each of the States and upon the non-resident as against the resident citizen. It is an inhibition against the Federal government from conferring, or even attempting to confer such privileges, as much so as if expressed in so many words. Congress itself cannot pass a law having such an effect, and it is clearly beyond the power of any other department of the government to confer it. Congress has not attempted to exercise such authority, and should it assume it, it would be met at the threshold by the two clauses already cited from the Constitution; nor would this Court hesitate for a moment to declare such an assumption of power unconstitutional and void. At least such is our abiding confidence.

I am thoroughly persuaded that the authority claimed in the Robbins case was never within the contemplation of the convention which framed or the people who adopted the Constitution.

For reasons already stated it is unreasonable to suppose

that the framers of the Constitution ever intended to assert or claim such power in the government they were creating, and it is more unreasonable to suppose that any State would have voluntarily agreed to surrender to another government the power to confer upon aliens or non-residents within her borders and jurisdiction privileges and immunities which in her wisdom and the legitimate exercise of her rights she might see fit to deny her own citizens.

The Constitution certainly intended to secure to every citizen of every State the right of traversing at will the territory of any and every other State, subject only to the laws applicable to its own citizens, of exercising there, freely but innocently, all of its facilities of acquiring, holding, and alienating property, as citizens might do, and of enjoying all other privileges and immunities common to the citizens of any State in which he might be present, or in which, without being present, he might transact business. But in securing these rights it does not exempt him from any condition which the law of the State imposes upon its own citizens, nor confer upon him any privilege which the law gives to particular persons for special purpose or upon prescribed conditions, nor secure to him the same privileges to which by the laws of his own State he may have been entitled. (Com. v. Milton, 12 B. Monroe, 219.)

In Corfield v. Coryell (4 Wash. Cr. Ct. Reports, 380) Judge Washington characterizes the privileges and immunities secured by this clause as being such as are "in their nature fundamental, which belong of right to the citizens of all free governments and which have at all times been enjoyed by the several States which compose this Union from the time of their becoming free, independent, and sovereign." This same idea is otherwise expressed when it is said they are such privileges and immunities as are common to the

citizens of any State under its constitution and constitutional laws.

The statute of Texas under which the plaintiff was fined, and which punishment forms the basis of this action, is, we confidently assert and believe, not obnoxious to any provision of the United States Constitution. The opinion in the Robbins case concedes this proposition as to State or resident drummers.

How it can be constitutional as to State or resident drummers, and unconstitutional as to non-resident drummers, is a proposition that cannot be understood when tested by Art. IV, Sec. 2, Part 1, of the Constitution. This statute does not discriminate—it simply levies a tax, a privilege tax, on drummers, etc., of thirty-five dollars. It specifies no locality or residence. We understand, of course, as it is Texas legislation, and passed by a Texas legislature, that it was intended to be hedged in by Texas boundaries and Texas jurisdiction. Texas was not legislating for New York or any other State, but simply for her own weal, under her own laws and Constitution, and by virtue of her own State sovereignty.

"As the law is valid so far as the inhabitants of the State are concerned, no inhabitant can engage in this business unless he pays the tax. If citizens of other States cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee and in favor of those of other States. This could never have been intended by the Legislature, and I cannot believe the Constitution of the United States makes such a thing necessary." (Dissenting opinion of Chief Justice Waite in Robbins' case.)

This is the law as was understood by the States, by the people, by the framers of the Constitution, and by the fathers, and we submit that it is now too late to change

this by judicial construction, and thus give the Constitution a meaning and a purpose never intended, and give it powers never delegated, and authority opposed to the expressed powers, and in defiance of those reserved by the States and the people and the acquiescence of a hundred years of precedent.

If this were not true the States might be forced to abandon certain classes of criminal laws and their enforcement without cause or conflict of power. It has been said by this court that "no one will deny that a State has a right to punish any individual found within its jurisdiction who shall have committed an offense within its jurisdiction against its criminal laws."

Again this court says "the right to punish or to prevent crime does in no degree depend upon the citizenship of the party who is obnoxious to the law." (New York v. Miln, 11 Peters, 161.)

Chief Justice Marshall, in Cohens v. Virginia, in 6 Wheat., 443, is very clear on this point, and says: "To interfere with the penal laws of a State where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government, is a very serious measure, which Congress cannot be supposed to adopt lightly or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed."

Here we have no act of Congress, nothing to indicate their legislative will, and, as we have seen already, there can be no conflict between Federal and State jurisdiction till they have both spoken, and adversely to each other. Then, how can it be that the Robbins decision is right?

If there has been any one proposition plainly, clearly, unequivocally, and definitely settled by this court since its

organization, accepted and followed by the various courts of last resort throughout the Union, implicitly, as the law of this land, it is that "a tax on business carried on within a State and without discrimination between its citizens and citizens of other States might be constitutionally imposed," and this applies equally to occupations. These decisions were *stare decisis.*

Though a contrary doctrine is announced, these decisions are not overruled by the Robbins case; they still stand as part of the law of the land, established by the court of last resort in the country.

They came into existence with the first court under the Constitution; they have been fostered and cherished under the Constitution; they have been honored by the endorsement of the various courts of last resort in the different States; they have grown with the growth of this country; they have shed their benign influences over the progress of our enlightened civilization; they have been a part and parcel of the machinery of the governments of the different States; they are fastened upon the minds of the people approvingly; they form one of the great links in the chain of patriotism that binds the States of this nation in the federal compact firmly together; they speak the true theory of our system of government and governmental policy; and they form one of the strongest bulwarks of our republican form of government. There is no occasion for overruling this line of decision, and every reason moves us to stand by them [as the law in the letter as well as in the spirit] of this country. They have been authority too long, and honored too strongly, and loved too deeply, to be torn ruthlessly away, and have the whole machinery of government reversed. Chancellor Kent says: "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we

can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very urgent reasons and upon a clear manifestation of error, and if the practice were otherwise it would be leaving us in a perplexing uncertainty as to the law."

1 Kent Com., 475.

Cooley Cons. Lim., p. 62.

Another great author says: "Liberty and steady progression require the principles of the precedent in all spheres. It is one of the roots with which the tree of liberty fastens in the soil of real life, and through which it receives the sap of fresh existence. It is the weapon by which interference is warded off.

"The principle of the precedent is eminently philosophical. The English Constitution would not have developed itself without it."

It made the common law, and the common law made, in the main, the English Constitution.

The Constitutions of the United States and of the various States of this Union are traceable to this same source, to a very great extent.

The Robbins decision is a retrogression. Its tendency is to unsettle where it has been settled, and disturb where everything was harmonious, and to start our wheels of government in the direction of that stronger form of government from which we came in the struggle of 1776 at so much cost and bloodshed.

In the perplexing attitude in which the question is left by the decision of the Supreme Court in the Robbins case, what was the duty and province of the State Court when the question was again presented before it?

The one line of decision, dating back to the beginning, was left, unreversed and not overruled, or might be so regarded, and was as binding as the other, because emanating from the same high authority.

On the one side stood the unbroken line of decisions from the foundation of this Federal government by the Supreme Court of the United States, and a heavy supporting column of the decisions of the various State courts of last resort, all concurring and coinciding with and endorsing the Supreme Court, while on the other stood the Robbins case, and it too decided by a divided court, a bare majority deciding, with a strong dissenting opinion to weaken its force and destroy its effect.

In such a state of case the State Court had a perfect right to make a selection of the doctrine that it would follow, that which was best established and commended itself as sound expositions of the law. And it is insisted it was the duty of the State Court to make the selection it did make, that the weight of authority required it, that reason and

precedent required it, and that it could have made no other selection without ignoring the frame-work of our republican form of government, and that the decision of the Court of Appeals of Texas is right, that it is the law, and should in all things be affirmed.

J. S. Hogg
Attorney-General of
and W. L. Davidso
Assist. Atty-Gen. of Te
for Deft. in Err

Office Supreme Court U. S.
FILED
OCT 17 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 781.

WM. G. ASHER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

1.

There is a constitutional distinction between "taxation" and "regulation." Congress is vested with power to *lay taxes*, &c. Art. 1, sec. 8, sub. 1, U. S. Const. It has power also to "*regulate*" commerce, &c. *Id.*, sub. 3.

It has not power to tax interstate articles of trade. Art. 1, sec. 9, *Id.*

It has taxed business pursuits like those of drummers, thereby setting a precedent for States to do the same thing. U. S. Stats. at Large, vol. 14, p. 115, acts 1866.

2.

There is a distinction between Tennessee and Texas laws:
1. The former discriminates in favor of drummers who have

local licensed houses; the latter does not. 2. The former makes it criminal to *offer* for sale or to *sell* any article of commerce without paying a tax; the latter makes it an offense to *pursue* the *occupation* without obtaining an annual license therefor. Compare the laws: Texas Special Session 1882, p. 18; Tennessee law as quoted in Robbins' case.

A *single* or *several acts* of *sale* do not constitute an offense, but it is *pursuing* the *occupation*, &c., that makes a violation of the Texas statute. Stanford *vs.* The State, 16 Court of Appeals of Texas, p. 331.

3.

To deny the State the right to levy the tax on all drummers, &c., is to force her to violate sec. 2, art. 4, and amendment XIV, U. S. Const.

4.

In principle the Robbins case conflicts in its application to Texas law with Nathan's Case, 8 How., p. 73; Warring's Case, 8 Wallace, 110; Woodruff's Case, 8 Wall., 123; Hinson *vs.* Lott, 8 Wall., 148; Ward *vs.* Maryland, 12 Wall., 418; State Tax on Gross Receipts of Railroad, 15 Wall., 284; Osborne *vs.* Mobile, 16 Wall., 479; Machine Co. *vs.* Gage, 100 U. S., 676; Grey *vs.* Baltimore, 100 U. S., 434; Walling *vs.* Michigan, 116 U. S., 446; Brown *vs.* Houston, 114 U. S., 622; Cooley on Const. Lim., pp. 384, 385; 2 Desty Taxation, pp. 1389, 1390; and *all* text books on the subject.

J. S. Hogg,
Attorney General for Texas.